

Date of Hearing: June 10, 2008

ASSEMBLY COMMITTEE ON JUDICIARY

Dave Jones, Chair

SB 1726 (Scott) – As Amended: June 5, 2008

As Proposed to be Amended

SENATE VOTE: 35-0

SUBJECT: ADOPTION: WAIVER OF RIGHTS

KEY ISSUE: SHOULD BIRTH PARENTS BE ALLOWED TO WAIVE THEIR RIGHT TO REVOKE CONSENT TO THEIR CHILD'S ADOPTION IN FRONT OF THEIR ADOPTION SERVICE PROVIDER, PROVIDED THEY ARE REPRESENTED BY INDEPENDENT COUNSEL?

SYNOPSIS

This bill, sponsored by the Academy of California Adoption Lawyers, is Senator Scott's annual bill to improve the adoption process. The most significant change in the bill allows birth parents to waive their right to revoke their consent to an adoption before an adoption service provider if they are represented by independent counsel. In addition, this bill clarifies that presumed and alleged fathers may waive their right to receive notice of adoption proceedings both before and after the child's birth, specifies where consolidated guardianship and adoption cases must be heard, and makes several provisions of the family code more gender neutral. These changes, according to the author, help better expedite adoptions, while appropriately balancing the needs of birth parents and adoptive parents. The sponsor writes that allowing adoption service providers to take the waiver of revocation rights provides birth parents with another option to shorten their revocation period that they may be more comfortable exercising, which, in turn, results in more peace of mind for adoptive parents. Opponents counter that this proposed new method of waiver could be subject to abuse, since the independent counsel, likely paid by the adoptive parents, may not be sufficiently independent to fully and fairly advise birth parents of their legal rights.

SUMMARY: Makes several changes to adoption requirements. Specifically, this bill:

- 1) Provides that if two or more presumptions for determining legal parenthood arise, including presumptions for establishing a mother-child relationship, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.
- 2) Applies rules governing parentage of a child born through artificial insemination to a child born through an embryo implanted in a woman with sperm from a man not married to the woman, and specifically applies the rules, gender neutrally, to spouses.
- 3) Provides that when a court joins a prospective adoptive parent who has physical custody of the child, or any licensed California adoption agency that has legal custody of the child, as parties to an action to determine the existence of a father-child relationship, or an action for

custody by the alleged natural father, without the necessity of a motion for joinder, no appearance fees shall be charged to the joined parties.

- 4) Clarifies that a presumed father and an alleged father may validly execute a waiver of notice or denial of paternity before or after the birth of the child, and once signed, no notice of, voluntary relinquishment for, or consent to the adoption of the child shall be required from the birth father for the adoption to proceed.
- 5) Provides that a presumed father may waive the right to notice of any adoption proceeding in front of either an authorized representative of the State Department of Social Services (DSS), an authorized representative of a public or private adoption agency, or a notary public.
- 6) Provides that a birth parent may waive the right to revoke consent to an independent adoption by signing a waiver in the presence of a judicial officer of a court of record, if the birth parent is represented by independent legal counsel, regardless of the availability of DSS or the delegated county adoption agency.
- 7) Provides that a birth parent may waive the right to revoke consent to an independent adoption by signing a waiver in the presence of an adoption service provider, if the birth parent is represented by independent legal counsel. Requires the birth parent's independent legal counsel to review the waiver, counsel the birth parent about the nature of his or her intended waiver, and sign and deliver to the birth parent and DSS a certificate of independent review. Provides that an adoption service provider may be present at any interview conducted for the purposes of a waiver except when the interview is being conducted by the birth parent's independent legal counsel. Requires that the waiver signed before an adoption service provider may not be delivered to DSS, the petitioner or the petitioner's counsel before the end of the business day following the signing, allowing the birth parent to withdraw the waiver during that period.
- 8) Provides that if a child is the subject of both an adoption and a guardianship petition and the proceedings are consolidated, the consolidated case must be heard and decided where the adoption is pending.

EXISTING LAW:

- 1) Provides that if two or more presumptions for determining a legal parent-child relationship arise, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. (Family Code Section 7612. All further references are to that code unless stated otherwise.)
- 2) Sets forth rules for determining parentage of a child born through artificial insemination (Section 7613.)
- 3) Provides that a court must join a prospective adoptive parent who has physical custody of the child, or any licensed California adoption agency that has legal custody of the child, as parties to an action to determine the existence of a father-child relationship, or an action for custody by the alleged natural father, without the necessity of a motion for joinder. (Section 7630.)

- 4) Requires a waiver of the right to revoke consent to an independent adoption to be signed in the presence of a representative of DSS or the delegated county adoption agency. If such representative is not available within 10 days or within 100 miles of the birth parent, the waiver may be signed in the presence of a judicial officer if the birth parent is represented by independent legal counsel. Requires DSS, the agency, or the court to interview the birth parent within 10 working days of receiving the request. Provides that an adoption service provider may be present at any interview conducted for the purposes of a waiver to provide support to the birth parent. (Section 8814.5.)
- 5) Authorizes proceedings to terminate the parental rights of an alleged father when the child is the subject of an adoption proceeding and the alleged father has not, in writing, denied paternity or waived his right to notice of, voluntarily relinquished the child for, or consented to, the adoption. (Section 7662.)
- 6) Provides that if a presumed father waives the right to notice of adoption proceedings in writing before a notary public, no notice of, voluntary relinquishment for, or consent to adoption shall be required from him for the adoption to proceed. (Section 7660.5.)
- 7) Provides that if a child is the subject of an adoption and a guardianship petition, the guardianship proceeding shall be consolidated with the adoption proceeding. (Sections 8714.5, 8802; Probate Code Section 1510.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: This bill, sponsored by the Academy of California Adoption Lawyers (ACAL), is ACAL's annual adoption cleanup bill to make substantive changes in the law to facilitate the adoption process. The author states that adoption is frequently one of the best things for children who cannot be cared for by their birth parents, and that this bill helps facilitate adoptions by appropriately balancing the needs of birth parents and adoptive parents.

This bill creates an alternative procedure by which birth parents may waive their right to revoke consent to an independent adoption. In 1992, the Legislature enacted SB 1148 (Bergeson), Chap. 1353, which was initiated as a response to three Orange County cases in which adopted children were reclaimed by birth parents after having lived in the home of adoptive parents for more than a year. That legislation set forth procedures for obtaining the consent of birth parents, ensuring that birth parents are advised of their rights prior to signing a placement agreement, specifying the qualifications and responsibility of adoption service providers, and setting the procedure and time frames for revoking a consent or waiving the right to revoke a consent. This bill provides an alternative procedure by which birth parents may waive their right to revoke that consent.

States vary as to whether birth parents may revoke consent to an adoption. A 2004 survey of the states found that five states make no provision for revocation of consent, and 23 allow revocation under limited circumstances, usually when there is strong evidence of fraud, duress, undue influence, coercion, or misrepresentation. Several states allow revocation for any reason during a limited time period, ranging from three to 30 days. Other states allow revocation only if there is mutual consent of the adopting family or a court finding that revocation is in the child's best interest. (Susan Price, Connecticut General Assembly, Office of Legal Research, Adoption: Birth Mothers' Rights to Revoke Consent (Sept. 13, 2004).)

Under California law, a birth parent who signs a consent to an independent adoption has 30 days during which he or she may revoke the consent and regain custody of the child. A birth parent who wishes to waive his or her right to revoke consent to an adoption must do so in the presence of a representative of DSS or the delegated county adoption agency. The waiver may only be signed after the consent to adoption has been signed, which, in turn, can only be signed after the child's birth. In addition, the waiver may not be signed until an interview has been completed by the department or agency representative. Alternatively, if a department or agency office is not able to conduct the interview within 10 days of a request, or is not within 100 miles of the birth mother, the waiver may be signed in the presence of a judicial officer, provided the birth parent is represented by independent legal counsel. In this instance, the judge conducts the interview.

This bill establishes two alternative procedures for birth parents who want finality in an adoption to waive the right to revoke consent. First, the bill allows them, if they have independent counsel, to sign the revocation waiver before a judicial officer, regardless of the availability of DSS or the delegated county adoption agency. No opposition has been raised to this provision of the bill.

Alternatively, the bill allows birth parents to sign the waiver in the presence of their adoption service provider if the birth parents are represented by independent legal counsel. The independent legal counsel is required to conduct the interview in lieu of a DSS representative, and counsel the birth parents on their rights under California law and the implications of the waiver. In addition, the independent legal counsel is required to sign a "Certificate of Independent Review," which attests to the attorney's ability to provide impartial counsel, and provide copies to both the birth parents and DSS. The waiver may not be delivered to DSS, the adoptive parents or their counsel before the end of the business day following the signing, thus giving the birth parents who signed the waiver a small window to change their minds. The adoption service provider is not allowed to be present during the interview, but may witness the signing of the waiver once the interview has been completed. Birth parents still have the option of going to DSS to execute a waiver if they so choose. However, for those who prefer to undergo a confidential interview with legal counsel, this bill provides an alternative with safeguards to help ensure birth parents are making informed decisions.

According to the author, birth parents and adoptive parents deserve an alternative which recognizes that birth parents want closure, and adoptive parents want assurance that the decision to place a child with the adoptive family will not be revoked unless there are extenuating circumstances. ACAL argues that birth mothers have a strong attachment to their adoption service provider, who in turn have a fiduciary duty to the birth parents. Birth parents who would otherwise waive the right to revoke are reluctant to go through an interview process with DSS and explain why they are giving their child up for adoption, but would be more comfortable doing so to their adoption service provider. In addition, the existence of the 30-day revocation period may discourage prospective adoptive parents from bonding with a child early on for fear that the child may be taken away. Writes ACAL: "This compromise gives birth parents the choice to shorten the time period for revoking their consent which results in the peace of mind for adoptive parents regarding the adoption when everyone is sure of their joint decision."

The Family Law Section of the State Bar is neutral on the bill, but would support it if amended to delete the need for independent counsel when an adoption service provider oversees the birth parents' waiver of their right to revoke consent, since an adoption service provider can take a

waiver without an attorney outside of California. Removing the independent legal counsel requirement "would allow adoption service providers in California to have the same authority as adoption service providers outside of California. Further, retaining (rather than removing) the "independent legal counsel" requirement of SB 1726 would add an unnecessary, time-consuming and expensive burden on the birth parent and the adopting parents."

Adopt International, a private adoption agency, opposes allowing adoption service providers to witness the signing of the waiver unless (1) the advisement by independent legal counsel occurs after the birth of the child; and (2) the birth parent is given five days after signing the waiver to change his or her mind and revoke the waiver. They argue that birth parents are extremely vulnerable and that the adoption service provider is almost always paid for by the prospective adoptive parents so that "allowing the Adoption Service Provider to witness to both the Consent to Adoption and the final and binding Waiver at the same time, opens the door for potential coercion of the birth mother as a result of pressure from the adoptive parents on the birth parent or the Adoption Service Provider to alleviate their anxiety and encourage expedition of the signing of the Waiver."

The California Association of Counties also opposes this part of the bill, writing:

Counties are concerned that SB 1726 removes some of the administrative procedures that are in place to protect the rights of both birth and adoptive parents by allowing an independent legal counsel – who may be hired by the adoption service provider or adoptive parents – to serve as an intermediary between often distressed birth parents and families desperate to adopt children.

Under current law a birth parent may sign a waiver in the presence of a county or state social services representative or a judicial officer. Public agencies and judicial officers serve as unbiased third party advisors; they have no economic or professional interest in the outcome of the signature of the waiver. Counties are not aware of data or documentation that points to problems with the current options to have public agencies serve as witnesses.

The author responds that this bill "simply offers another reasonable alternative for birth parents – who choose this option." By requiring that, before the waiver can be signed in front of an adoption service provider, independent legal counsel is required to conduct the interview with and counsel the birth parents on their rights under California law and the implications of the waiver, this bill balances "the needs of both birth parents and adoptive parents." The informational session with the independent counsel may occur before the birth –when the birth parent may be most coherent and most able to fully understand the information – but the consent and subsequent waiver cannot be signed until after the birth. This should help ensure that birth parents are given the information when they are most able to fully understand it, but only required to take action after their child's birth, when they can easily change their mind by simply not signing the consent form or the waiver of their revocation right.

Clarifying Amendments: The author correctly proposes to amend the bill to clarify that, while independent counsel is necessary for the waiver to be signed before a judicial officer, there is no requirement that the independent counsel sign a Certificate of Independent legal Review in these instances. The following amendments clarify that:

1. On page 14, line 32, after "section" insert: "."
2. On page 14, line 32, delete ", in which case the judicial officer or" and insert: "If the waiver is signed in the presence of a judicial officer, the interview and the witnessing of the signing of the waiver shall be conducted by the judicial officer. If the waiver is signed in the presence of an adoption service provider,"

In addition, in order to ensure that a birth parent can withdraw a waiver before it is forwarded by the adoption service provider, the following technical amendment is necessary:

On page 14, line 16, delete "may" and insert: "shall"

Finally, in order to ensure consistency with that change, page 9, line 5 must be amended as follows: delete "may" and insert: "shall"

This bill specifically allows presumed and alleged birth fathers to waive notice of adoption proceedings before the birth of their child. A man married to the birth mother is presumed to be the natural father of a child if the child is born during the marriage, or within 300 days after the marriage is terminated. (Section 7611.) Current law also recognizes presumed fathers where the couple is unmarried, but have attempted to do so prior to the child's birth or the man openly holds out the child as his natural child. (*Id.*) A presumed birth father has the same rights and responsibilities as a birth mother and an adoption cannot proceed without the presumed father's consent, unless his parental rights have been terminated or he has voluntarily relinquished the child for adoption.

An alleged father is a man who is identified by the birth mother as the potential birth father of a child. Alleged fathers must be notified by the adoption petition, but a court may end their parental rights if they fail to bring an action to establish paternity within 30 days of being served with notice of an adoption proceeding. (Section 7662.) Alleged fathers may also consent to an adoption, waive notice of the proceeding, sign a denial of paternity, or voluntarily relinquish a child for adoption. (*Id.*)

Although current law allows presumed and alleged birth fathers to waive notice of adoption and termination of parental rights proceedings, the statutes are ambiguous as to when the waivers may occur. In the past, the forms prepared by DSS allowed for a presumed father to waive notice before or after the birth of the child. However, DSS recently changed its forms to only allow waivers to occur after the child has been born. The sponsor asserts that practice in California law has always allowed for pre-birth waivers by presumed fathers, and would like the statute to specifically authorize them. This bill would do just that.

Under current law, only notaries may witness waivers of notice of adoption and termination of parental rights proceedings by presumed fathers. All other waivers, denials, relinquishments, and adoption-related documents are usually witnessed by notaries or authorized representatives of DSS, or of licensed adoption agencies. This bill specifically allows authorized adoption agency representatives to witness these waivers. These social workers may well be preferable to notaries since they could, and presumably would, discuss the adoption plan, provide options for counseling, and otherwise ensure that the waiver is signed knowingly.

The bill makes several other changes to adoption law. This bill also makes several other, more minor changes to adoption law. First, the author's 2007 adoption bill, SB 313 (Scott), Chap. 47,

provided that a court has to join a prospective adoptive parent who has physical custody of the child, or any licensed California adoption agency that has legal custody of the child, as parties to an action to determine the existence of a father-child relationship, or an action for custody by the alleged natural father, without the necessity of a motion for joinder. This bill provides that if joinder occurs, no appearance fees can be charged to the joined parties. This change ensures that fee exemptions for termination of parental rights in adoption cases are carried over when such actions are joined to parentage actions.

Second, this bill makes several changes to ensure statutes are more gender neutral. It ensures first that when multiple parentage presumptions apply, whether to mothers or fathers, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. This is currently how multiple presumptions of fatherhood are treated and this bill applies the same standard to multiple presumptions of motherhood. The bill also ensures that the statute governing artificial insemination applies in a gender neutral fashion and regardless of whether the insemination is used in connection with an implanted embryo.

Finally, the law currently requires a guardianship case to be consolidated with an adoption case if the same child is the subject of each action. The statutes are silent as to where the consolidated case should be heard. This bill specifies that the guardianship case must be heard in the court where the adoption is pending.

REGISTERED SUPPORT / OPPOSITION:

Support

Academy of California Adoption Lawyers (sponsor)
Family Law Section of the State Bar (if amended)

Opposition

Adopt International (unless amended)
California State Association of Counties

Analysis Prepared by: Leora Gershenzon / JUD. / (916) 319-2334